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Nos. 91-680 and 91-681

In the Supreme Court of the United States

OCTOBER TERM, 1991

FAIRWAY SPRING CO., INC., ET AL., PETITIONERS

v.

SOVRAN BANK/MARYLAND

CHEMUNG CANAL TRUST COMPANY, ETC., PETITIONER

v.

SOVRAN BANK/MARYLAND

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal courts, in developing a federal common law under the Employee Retirement Income Security Act (ERISA), may recognize claims for contribution or indemnity among fiduciaries.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1981, petitioner Fairway Spring Company, Inc., established an employee retirement plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Acting through its officers,[1] Fairway appointed Glen Dawson as plan trustee.

[1] Theodore Paterson, Donald R. Peterson, and Dorothy Tarby, who are officers and directors of Fairway, and Lynn Keyser, the

Pet. App. A29-A30. Between 1982 and December 1, 1984, when he was removed, Dawson made various imprudent investments and engaged in transactions prohibited under ERISA's fiduciary standards. In the wake of Dawson's departure, his investments initially continued to yield income, but payments from certain of his investments eventually ceased, resulting in losses to the plan. *Id.* at A30; 91-680 Pet. 2-3.

After Dawson's removal, petitioner Lynn Keyser, the plan's attorney, exercised fiduciary authority over the plan for two months. On February 1, 1985, respondent Sovran Bank/Maryland was appointed trustee. Pet. App. A30. In 1989, Fairway removed Sovran and appointed Chemung Canal Trust Company, petitioner in No. 91-681, as plan trustee. *Id.* at A30.

2. In an effort to recover plan losses, Chemung brought this action under Section 502 of ERISA (29 U.S.C. 1132) against respondent Sovran Bank, in its capacity as former trustee. The complaint alleged that Sovran had breached its fiduciary duty to the plan by failing to discover and rectify Dawson's imprudent investments; by failing to bring timely actions against Dawson and the fidelity bond and insurance companies that had issued policies covering the losses [2]; and by making two unsound investments during its tenure as trustee. Plaintiffs sought over $1.5 million in damages plus interest from Sovran. Pet. App. A29; 91-680 Pet. 3.[3]

Sovran filed a counterclaim against Chemung, asserting that Chemung contributed to the plan's losses by failing

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Fairway pension plan's attorney, are petitioners in No. 91-680. Chemung Canal Trust Co., petitioner in No. 91-681, is presently trustee of the plan.

[2] In 1986, the Department of Labor sued Dawson to recover losses to 46 pension plans, including Fairway's. Br. in Opp. 3 n.2. Dawson filed for bankruptcy and the Fairway plan recovered $4,000 as its pro-rata share under the consent order. *Ibid.*

[3] Two plan beneficiaries were also plaintiffs in Chemung's suit. See Pet. App. A16. They did not participate in the court of appeals and are not parties in this Court.

to evaluate and pursue the pertinent claims. Pet. App. A16. Sovran sought relief on behalf of the plan, as well as contribution or indemnity for its own potential liability. *Id.* at A16, A31. Sovran also filed a third-party complaint against Fairway, its officers, and its counsel, claiming that they had breached their fiduciary duties under ERISA because they had not monitored and corrected Dawson's breaches or disclosed them to Sovran. *Id.* at A16, A30. Accordingly, Sovran requested contribution or indemnity from the Fairway third-party defendants. *Id.* at A16, A31.

3. The district court dismissed Sovran's counterclaim and its third-party complaint. Pet. App. A15-A23. First, the court held that Sovran—as a former fiduciary—did not have standing to bring a counterclaim on behalf of the plan. *Id.* at A17-A18. Second, the court concluded that ERISA did not allow claims for contribution or indemnity among fiduciaries. The court concluded that a right of contribution was unavailable because it was not implied in the statute and did not arise from federal common law. *Id.* at A18-A23. The court determined that the indicia of an implied cause of action were absent from the statutory scheme. Moreover, while acknowledging that ERISA authorizes courts to develop a substantive federal common law of rights and obligations, the court found that the integrated and comprehensive nature of the statute's remedial scheme counseled against adding further remedies to its enforcement provisions. *Id.* at A21-A22.

4. The court of appeals reversed and remanded with respect to Sovran's claims for contribution and indemnity.[4] Pet. App. A33-A40. The court concluded that the analytical framework for deriving implied rights of action was inapposite because the question before it involved the allocation of responsibility among defendants rather than the plaintiff's right to relief. *Id.* at A34. Instead,

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[4] The court of appeals affirmed the district court's holding that a former fiduciary has no standing to sue on behalf of the plan under Section 502(a) of ERISA, 29 U.S.C. 1132(a). Pet. App. A31-A33.

the court determined that Congress had directed the courts to develop a federal common law using traditional principles of trust law, and that a right of contribution among co-trustees was "an integral and universally-recognized part of trust doctrine." *Id.* at A35. The court further determined that the common law rule was consistent with ERISA: the rule would have "no financial impact" on the recovery of plan beneficiaries, who would be able to recover fully from any breaching fiduciary under a theory of joint and several liability (*id.* at A36); and any increase in the complexity of ERISA fiduciary litigation would be justified by the need to protect a fiduciary from bearing the full weight of a loss for which it was only partially responsible. *Ibid.* Thus, the court found that fiduciaries are entitled to assert the traditional trust law right of contribution under the common law of ERISA. *Ibid.*[5]

DISCUSSION

In our view, the court of appeals correctly determined that ERISA authorizes federal courts to apply the equitable doctrines of contribution and indemnity in apportioning liability among plan fiduciaries. This Court's precedents establish that ERISA requires courts to develop a federal common law governing fiduciary rights and obligations using traditional trust principles. The right of contribution among fiduciaries is a well established feature of the common law of trusts, and nothing in ERISA compels a departure from that rule.

Although the issue is important, we do not believe that further review is warranted at this time. Nine of the circuits have had no occasion to address this issue in the 18 years since ERISA was adopted. Moreover, the Ninth

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[5] Judge Altimari dissented. Pet. App. A40-A41. Although he believed the majority's holding made "good sense," *id.* at A40, Judge Altimari reasoned that Congress was aware that the issue of contribution or indemnification would arise under ERISA, and that Congress's omission of express contribution remedies for fiduciaries demonstrated that such rights had been rejected. *Id.* at A41.

Circuit—the only circuit to reject a right of contribution —has never directly addressed the merits of arguments that the Second Circuit found dispositive of the issue. We do not believe review by this Court is needed unless and until it becomes apparent that the courts of appeals cannot reach a consensus on the issue.

1. ERISA § 404 provides, in relevant part, that a fiduciary of an ERISA-regulated plan must "discharge his duties with respect to a plan * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Under ERISA § 409, moreover, a fiduciary who breaches the duties imposed by subchapter I, 29 U.S.C. 1001-1168, "shall be personally liable to make good to [an ERISA] plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. 1109(a). Section 409(a) also subjects a breaching fiduciary "to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. 1109(a).

ERISA § 502(a), 29 U.S.C. 1132(a), provides a mechanism for certain parties to seek redress for any breach of the fiduciary duties imposed by ERISA. Specifically, Section 502(a)(2) authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [ERISA § 409]." 29 U.S.C. 1132(a)(2). More generally, a breach of fiduciary duty is cognizable under Section 502(a)(3), which authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter [protection of employee benefit rights] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the

terms of the plan." 29 U.S.C. 1132(a)(3). Finally, under Section 502(a)(5), the Secretary of Labor enjoys similar authority to bring a civil action to obtain "appropriate equitable relief" to enforce ERISA's employee benefit protections and to redress violations of the statute. 29 U.S.C. 1132(a)(5). Section 502(e), 29 U.S.C. 1132(e), vests federal courts with jurisdiction to entertain any "civil action" brought by these parties under ERISA.

Although the statute includes detailed provisions concerning the rights of these parties to sue fiduciaries to recover losses to beneficiaries and the plan, the statute does not address rights of other parties to sue fiduciaries or make any express provision for assertion of claims among fiduciaries responsible for plan losses.[6] This Court has made clear, however, that a right of contribution can properly be recognized in the absence of express statutory authority if Congress either intended to create that right by implication, or if it authorized the courts to derive such a right as a rule of federal common law. See *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90 (1981); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). We share the court of appeals' view that Congress did authorize federal courts to determine whether a right of contribution should be recognized under the common law of ERISA, and that the equitable doctrine of contribution should properly form a part of that common law. Pet. App. A34-A40.

2. a. There can be no question that adjudication of a breach of fiduciary duty claim under ERISA requires resort to a federal common law of trusts. As this Court has

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[6] At common law, breaching co-trustees were generally liable for contribution from each other, but if one trustee was substantially more at fault than the other, received a benefit from the breach, or acted in bad faith, then the other trustee could obtain indemnity. See Restatement (Second) of Trusts § 258 (1959). For purposes of simplicity, we use the term "contribution" to refer to contribution or indemnity.

explained, "ERISA abounds with the language and terminology of trust law," *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989), and ERISA's "fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, 'codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" 489 U.S. at 110 (quoting H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973)). Accordingly, this Court has recognized that ERISA authorizes courts "to develop a 'federal common law of rights and obligations under ERISA-regulated plans,'" 489 U.S. at 110 (quoting *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987)), and that traditional principles of trust law are to be consulted in deriving federal common law under ERISA, see, *e.g.*, 489 U.S. at 111-115; *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

This Court has already determined that ERISA's authorization to develop federal common law rules is not limited to the substantive rights and obligations of ERISA plan fiduciaries, but also extends to the remedial provisions of ERISA. In *Firestone*, 489 U.S. at 108-115, the Court considered the appropriate standard of judicial review governing challenges to a plan's denial of benefits brought in actions under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). Even though ERISA contains "a panoply of remedial devices" and represents a "comprehensive and reticulated statute," the Court concluded that Congress had not addressed all issues arising under that remedial scheme, but had instead delegated common law authority to the courts to answer unresolved questions. 489 U.S. at 108-111 (citation omitted). Thus, instead of resorting to the usual principles of statutory interpretation that ordinarily govern such questions, the Court examined established principles of trust law, and created a federal common law rule defining the scope of the remedy. *Firestone*, 489 U.S. at 111-115.

Similarly, congressional silence on the issue of contribution requires resort to common law principles under

ERISA. No part of Section 502(a) explicitly addresses the manner in which liability is to be enforced when more than one fiduciary is responsible for a single breach. Nor is that issue mentioned in ERISA § 405(a), 29 U.S.C. 1105(a),[7] the provision prescribing the conditions under which one fiduciary may be liable for another's breach. Section 405 merely states that one fiduciary "shall be liable" for the breach of another in some circumstances, but it says nothing about how liability is to be allocated, if at all, among the fiduciaries who are liable for the same breach. No statutory provision specifies that fiduciaries who share responsibility for a joint breach shall be jointly and severally liable. Nor does anything in the text even speak to whether a plaintiff would be limited to a single recovery, as opposed to being able to execute the same judgment against all fiduciaries liable for the

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[7] Section 405(a), 29 U.S.C. 1105(a), provides:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with [ERISA § 404(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Section 405(c), 29 U.S.C. 1105(c), provides that the plan may allocate certain responsibilities among fiduciaries, and that a fiduciary whose duty is allocated to another person is not liable for that person's breach of duty, unless the allocation of duty itself involves a breach of fiduciary duty. That provision, however, does not speak to the division of liability when multiple fiduciaries are liable for the same unallocated duty.

same breach.[8] Of particular relevance here, ERISA nowhere addresses whether a fiduciary must bear the entire burden of a jointly inflicted loss, or if he may instead seek an equitable allocation of that loss through a right of contribution. As in *Firestone*, the statute has left a remedial gap to be filled through the development of federal common law rules.[9]

b. The federal common law under ERISA should properly incorporate the equitable doctrine of contribution. First, the "established principles of trust law," *Firestone*, 489 U.S. at 115, and "the common law of trusts," *Central States*, 472 U.S. at 570, strongly support this conclusion. Under the common law of trusts, multiple trustees who jointly commit a breach of fiduciary duty, and trustees liable for the breach of another, are subject to joint and

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[8] Nevertheless, courts have held that ERISA imposes joint and several liability on fiduciaries, see, *e.g.*, *Kay* v. *Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co.*, 780 F. Supp. 1447, 1461 (E.D. Pa. 1991); *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 644 (W.D. Wis. 1979), and that plaintiffs are limited to a single satisfaction of a judgment for their losses, see *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1030-1031 (2d Cir. 1992).

[9] For other decisions fashioning remedies where ERISA's remedial scheme is silent on the availability of the remedy in question, see, *e.g.*, *PM Group Life Insurance Co.* v. *Western Growers Assurance Trust*, 953 F.2d 543, 546-547 (9th Cir. 1992) (adopting federal common law rule to coordinate benefits between two ERISA-regulated health benefits plans); *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1179, 1186 (3d Cir. 1991) (in suit against fund for recovery of benefits, authorizing fund and administrator to bring cross-claim seeking restitution of benefits paid to the wrong claimant); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987) (piercing the corporate veil); *Donovan* v. *Mazzola*, 716 F.2d 1226, 1235-1236 (9th Cir. 1983) (relying on common law trust remedies to uphold order requiring fiduciaries to post bond for potential future losses resulting from a breach of fiduciary duty), cert. denied, 464 U.S. 1040 (1984).

several liability. See, *e.g.*, Restatement (Second) of Trusts § 224 cmt. a (1959); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 701, at 195-196 (rev. 2d. ed. 1982), 3A A. Scott & W. Fratcher, *The Law of Trusts* § 258, at 399 (4th ed. 1988).[10] But when the rules of joint and several liability result in a trustee's paying a disproportionate share of damages arising out of a breach, that trustee may in appropriate circumstances seek contribution or indemnity from other fiduciaries under equitable principles. See, *e.g.*, Restatement (Second) of Trusts, *supra*, § 258; G. Bogert & G. Bogert, *supra*, § 701, at 196-197; 3A A. Scott & W. Fratcher, *supra*, §§ 258-258.2, at 399-405. Otherwise, a trustee who was merely negligent in failing to protect beneficial interests would be required to bear full responsibility for losses even where another trustee caused the losses through intentional wrongdoing. See note 14, *infra*.

Second, adhering to the traditional trust law rule of contribution is consistent with "the policy of the legislation." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957).[11] ERISA protects plan partici-

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[10] This Court has repeatedly consulted the sources cited in text in fashioning federal common law rules under ERISA. See, *e.g.*, *Firestone*, 489 U.S. at 111-112, 115; *Central States*, 472 U.S. at 570 n.11.

[11] The Fairway petitioners claim that recognizing a right of contribution would disserve ERISA's objectives by (1) deterring entities from assuming the role of fiduciary, and (2) increasing the complexity and cost of litigation. 91-680 Pet. 12-18. Neither concern justifies departing from the traditional rule. First, a fiduciary is exposed to personal liability under ERISA, 29 U.S.C. 1109(a), irrespective of any right of contribution. While a fiduciary confronts more potential claimants if a right of contribution is permitted, the fiduciary also may be able to shift liability to culpable co-fiduciaries. Second, any problems associated with greater complexity in litigation may be mitigated by the court's authority to sever third-party claims for contribution or indemnity. Fed. R. Civ. P. 14(a). In deciding a Rule 14 motion, "the court typically is

pants and beneficiaries by establishing standards of fiduciary conduct and supplying appropriate remedies and sanctions for their breach. 29 U.S.C. 1001(b). Because of joint and several liability, a right of contribution will have "no financial impact on the recovery of plaintiffs," who may obtain full recovery from "any or all of the breaching fiduciaries." Pet. App. A36; see *Free* v. *Briody*, 732 F.2d 1331, 1338 (7th Cir. 1984). At the same time, such a remedy may, in many cases, assist plaintiffs in proving their case by giving defendant fiduciaries an incentive to establish the fault of co-fiduciaries who participated in a breach. In addition, a fiduciary who can seek contribution may be more willing to settle a meritorious claim and reimburse the plan for its losses.[12] Finally, because a plaintiff may, for a va-

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concerned with the effect the additional parties and claims will have on the adjudication of the main action—in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." 6 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1460, at 457 (2d ed. 1990). District courts possess like authority relative to counterclaims. Fed. R. Civ. P. 42(b). In any case, this Court in *Firestone*, 489 U.S. at 115, rejected the asserted potential for increased litigation as a basis for departing from traditional trust law.

[12] It has been suggested that a defendant may be more inclined to settle a lawsuit if the defendant confronts the entire damages award. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156, 1161 (1941). However, a plaintiff's ability to coerce "a still-unproved tortfeasor into a favorable settlement by threatening to sue him alone" does not appear to be a legitimate basis for opposing the availability of contribution. Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 Harv. L. Rev. 1170, 1172 (1941). It has also been suggested that a rule of contribution may deter a defendant from settling if the settlement does not protect him from a subsequent lawsuit seeking contribution. James, 54 Harv. L. Rev. at 1161. But a court of equity can address that concern by adopting rules under which a settlement may, in some circumstances, bar a later claim for contribution, with an appropriate adjustment in the liability of nonsettling defendants. See *In re Masters Mates & Pilots Pension*

riety of reasons, choose to sue fewer than all of the potential wrongdoers,[13] a right of contribution may be the only means of ensuring that the least culpable fiduciary does not bear the entire burden of liability while the most culpable fiduciary does not bear any. See W. Prosser & W. Keeton, *The Law of Torts* § 50, at 337-338 (5th ed. 1984).[14]

3. a. Petitioners err in contending, 91-680 Pet. 8-12, that the decision below conflicts with this Court's decisions rejecting a federal common law right of contribution under other statutes, namely Title VII and the Equal Pay Act, see *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, and the antitrust laws, see *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, *supra*. In fact, the reasoning of those decisions supports the court of appeals' holding in this case.

Both decisions rested upon the conclusion that federal courts lack general authority to fashion rules of federal

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Plan and IRAP Litigation, 957 F.2d 1020, 1028-1032 (2d Cir. 1992). The availability and scope of such a remedy under ERISA § 502 is not before this Court.

[13] For example, if the facts alleged by Sovran are true, Fairway is primarily responsible for failing to discover and remedy the breaches occurring before Sovran's appointment as trustee. Yet the current trustee, Chemung, has sued Sovran (the trustee that it replaced), rather than Fairway (the fiduciary that selected Chemung to replace Sovran).

[14] When a defendant seeks contribution in the case of an intentional tort, it is appropriate to deny that individual relief from his own deliberate wrong. But there is an "obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the other goes scot free." W. Prosser & W. Keeton, *supra*, § 50, at 337-338. Consistent with that view, traditional trust law limits the right of contribution to those trustees who have not breached their fiduciary duty in bad faith. See, *e.g.*, Restatement (Second) of Trusts, *supra*, § 258.

common law, and that no authority to fashion a federal common law rule of contribution existed under Title VII or the Equal Pay Act, *Northwest Airlines*, 451 U.S. at 95, 97-98, or under the antitrust laws, *Texas Industries*, 451 U.S. at 640, 643-646. But the Court was careful to emphasize that there are areas in which federal courts possess authority to create governing rules of federal common law. For example, the Court cited general admiralty jurisdiction as a source of federal common law authority, noting that *Cooper Stevedoring*, *supra*, had relied on "traditional admiralty doctrine" to find a federal common law right of contribution among joint tortfeasors. *Northwest Airlines*, 451 U.S. at 95-97; see *Texas Industries*, 451 U.S. at 641-642. The Court also noted that LMRA § 301 presents an "analogous situation" to that of admiralty, because Congress supplied federal jurisdiction and the authority to create judge-made federal rules of decision under the LMRA. *Northwest Airlines*, 451 U.S. at 96 n.35; see *Texas Industries*, 451 U.S. at 642-643 (Section 301 "not only * * * grant[s] jurisdiction over defined areas of labor law but also * * * vest[s] in the courts the power to develop a common law of labor-management relations").

Because ERISA supplies courts with federal common law rule making power to give content to the broad remedial provisions of Section 502(a), *Firestone*, 489 U.S. at 110-114, this case is governed by the same principles that apply in the admiralty and LMRA contexts. Indeed, Congress explicitly patterned Section 502(a) of ERISA after Section 301 of the LMRA (29 U.S.C. 186). See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974) ("All * * * actions [under Section 502(a)] * * * are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."); 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams) (same). This Court has confirmed, moreover, that ERISA § 502 is comparable to LMRA § 301 in

that it broadly preempts state law remedies, with the expectation that courts will develop a federal common law to provide uniform rules of decision. *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54-56 (1987); see *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485-486 (1990).[15]

Thus, the court of appeals in this case was justified in adopting a right of contribution under Section 502 of ERISA. Just as this Court in *Cooper Stevedoring*, 417 U.S. at 110, properly crafted a federal common law right of contribution based on "traditional admiralty doctrine," *Northwest Airlines*, 451 U.S. at 97, the court below appropriately consulted "traditional trust law" to fashion a federal common law right of contribution under ERISA. Pet. App. A35. In addition, this Court has adopted federal common law rules to apportion liability between wrongdoers under LMRA § 301. See, *e.g.*, *Bowen* v. *United States Postal Service*, 459 U.S. 212, 224-228 (1983); *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967); see also *Rozay's Transfer* v. *Local Freight Drivers, Local 208*, 850 F.2d 1321, 1334-1335 (9th Cir. 1988) (right of indemnification under LMRA § 301), cert. denied, 490 U.S. 1030 (1989).[16] In view of the similarity of the

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[15] Petitioners argue that ERISA provides only "interpretive" common law authority, and not the authority to fashion rights and obligations. 91-680 Pet. 9. However, this Court has made clear that admiralty jurisdiction grants the federal judiciary authority "to fashion rules of law" and that Section 301 of the LMRA presents an "analogous situation." *Northwest Airlines*, 451 U.S. at 96-97 & n.35. Because ERISA § 502(a) was patterned after LMRA § 301, *Pilot Life*, 481 U.S. at 56, petitioners' contention is misplaced.

[16] It is true that the Court in *Texas Industries* noted a similarity between Section 301 of the LMRA and the "sweeping language" of the substantive provisions of the Sherman Act, 15 U.S.C. 1, 2; 451 U.S. at 642-643, but then found no authority to fashion a right of contribution under the "detailed and specific" remedial provisions of the antitrust laws. *Id.* at 643-646. In contrast, this Court has made clear that the open-ended remedial provisions of Section 502(a) are to be given content using federal common law. *Firestone*, 489 U.S. at 110-111.

grant of federal common law making authority under ERISA, *Texas Industries* and *Northwest Airlines* present no impediment to the court of appeals' decision in this case.

b. Contrary to petitioners' contention, 91-680 Pet. 19-20; 91-681 Pet. 6, the court of appeals' ruling is consistent with this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of his claim for benefits, asserting a right to recover compensatory and punitive damages not available under the terms of the plan. Section 502(a)(1)(B), however, explicitly authorizes a beneficiary who has wrongfully been denied benefits to bring a claim "to recover benefits due to him *under the terms of his plan.*" 29 U.S.C. 1132(a)(1)(B). The claim asserted by the beneficiary accordingly went beyond the congressional description of the beneficiaries' remedy (473 U.S. at 144), and the Court in *Russell* was asked to decide whether the apparent limitations on the remedy set forth in that Section could be avoided by permitting the claim to proceed under ERISA § 502(a)(2), which permits a beneficiary to sue a fiduciary for breaches of fiduciary duty under Section 409.

The Court declined to read Section 409 as enlarging the beneficiary's "explicitly authoriz[ed]" (473 U.S. at 144) right to recovery for wrongful denial of benefits. Instead, the Court interpreted Section 409—which provides that a fiduciary "with respect to [an ERISA] plan" is personally liable to "make good to such plan any losses to the plan" resulting from a breach of the fiduciary's duties—to require that damages under Section 409 "inure[] to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Although Section 409 authorizes a court to award "such other equitable or remedial relief as the court may deem appropriate," 29 U.S.C. 1109(a), the Court concluded that this language only authorized " 'plan-related' relief," and did not permit a beneficiary to seek

extracontractual damages in his personal capacity. 473 U.S. at 142.[17]

Nothing in *Russell* forecloses the court of appeals' decision here. First, the court of appeals' derivation of a federal common law right of contribution among fiduciaries, Pet. App. A35-A40, does not conflict with *Russell*'s holding that the broad equitable provisions of Sections 409 and 502(a)(2) are limited to "'plan-related' relief," 473 U.S. at 142. This civil action arises out of a claim properly brought under Section 502(a)(2) on behalf of an ERISA plan based on a breach of fiduciary duty. Thus, unlike *Russell*, the question is not whether the action is within the scope of Sections 409 and 502(a)(2), but whether the court may, in fashioning "appropriate" relief, shape the award under Sections 409 and 502 to apportion damages equitably by recognizing a right of contribution.[18] In light of traditional trust principles, and

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[17] The Court also rejected the argument that ERISA authorized an implied right of action for extracontractual damages, reasoning that the comprehensive nature of the remedial scheme made it unlikely that Congress intended to imply remedies that it did not include expressly. 473 U.S. at 145-148.

[18] This case does not present the distinct question whether a fiduciary may bring an independent lawsuit seeking contribution under Section 502(a)(3), 29 U.S.C. 1132(a)(3). Respondent is a former fiduciary; hence, it is unclear whether respondent would be able to invoke the jurisdiction of the district court under Section 502(e). See *Franchise Tax Board* v. *Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 21 (1983) ("The express grant of jurisdiction in ERISA is limited to suits brought by certain parties."); 29 U.S.C. 1132(a) (specifying only the Secretary of Labor, participants, beneficiaries, and fiduciaries among the parties who may sue under Section 502). However, even if respondent were unable to bring an independent lawsuit, that fact would not affect the district court's ability to entertain a third-party claim as part of a proper lawsuit against it under Sections 409 and 502 of ERISA. Cf. *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1179, 1186 (3d Cir. 1991) (in beneficiary's action for benefits under Section 502(a)(1)(B), fund and administrator may assert cross-claim for restitution against second beneficiary who wrongly received benefits, even though Section 502(a)(1)(B) authorizes only participants and beneficiaries to sue). If

the broad federal common law rule making authority under Section 502(a), contribution assuredly constitutes "appropriate" relief, whether the underlying action is brought under Sections 409 and 502(a)(2) or under Sections 502(a)(3) or 502(a)(5).

Second, resort to common law may not have been appropriate in *Russell* because Congress "explicitly" addressed the scope of the beneficiary's rights to recovery for wrongful denial of benefit claims in Section 502(a)(1)(B). In contrast, no section of ERISA expressly addresses the rights of fiduciaries for apportionment of liability among themselves. This case is therefore not controlled by *Russell*; rather, it is controlled by *Firestone*—which requires resort to common law doctrine where Congress simply did not address a remedial issue.

4. a. Although there is disagreement among the circuits concerning the existence of a fiduciary's right to contribution under ERISA, we do not believe that there is a conflict warranting this Court's review. Only three circuits have squarely addressed the issue presented by the petition, and it is not clear that the law has been settled even in those circuits. The Seventh Circuit has held that a right of contribution or indemnity among fiduciaries is available under ERISA. *Free* v. *Briody*,

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the district court has jurisdiction over a "civil action" under Section 502(e), 29 U.S.C. 1132(e), it also has jurisdiction to consider third-party claims for contribution under 28 U.S.C. 1367(a), which provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder * * * of additional parties.

And if federal common law supplies a right of contribution, then Rule 14(a), Fed. R. Civ. P., provides a procedural mechanism for impleading co-fiduciaries as third-party defendants.

732 F.2d 1331, 1337 (1984); see *Alton Memorial Hospital* v. *Metropolitan Life Insurance Co.*, 656 F.2d 245, 250 (7th Cir. 1981) (dictum). However, subsequent cases in the Seventh Circuit have characterized the pronouncements of *Free* and *Alton* as dictum, and have treated the issue of contribution under ERISA as unsettled.[19]

Although the Ninth Circuit has rejected a right of contribution under ERISA, see *Kim* v. *Fujikawa*, 871 F.2d 1427 (1989); *Call* v. *Sumitomo Bank*, 881 F.2d 626 (1989), it did so without explicitly discussing whether the common law grounds for relief relied upon by the Second Circuit created a right of contribution. In *Kim*, the court determined that Congress did not intend to imply a private right of action for contribution, but did not decide whether such a right could be derived as a rule of federal common law under ERISA's broad remedial provisions. In *Call*, the Department of Labor filed a brief as amicus curiae arguing that the Ninth Circuit should recognize a right to contribution based on federal common law. See Pet. App. A53-A63. Although the court of appeals deemed those arguments "persuasive," it concluded that the decision in *Kim* foreclosed reconsideration of the issue of contribution. 881 F.2d at 630-631.[20] The Ninth Circuit

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[19] See *Lumpkin* v. *Envirodyne Industries, Inc.*, 933 F.2d 449, 464 n.10 (7th Cir.), cert. denied, 112 S. Ct. 373 (1991); *Donovan* v. *Robbins*, 752 F.2d 1170, 1178 (7th Cir. 1985) (assuming without deciding that the "dicta" in *Free* and *Alton* are correct); *Mutual Life Insurance Co.* v. *Yampol*, 706 F. Supp. 596, 599-600 (N.D. Ill. 1989) (declining to follow *Free* and *Alton* on the ground that this Court's later decision in *Russell* undercut their rationale). In reserving the question whether ERISA authorizes a right of indemnification between a trustee and a nonfiduciary, the Fifth Circuit approvingly made passing reference to *Free*'s holding in *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (1988), cert. denied, 490 U.S. 1089 (1989). The Fifth Circuit, however, has never squarely addressed whether a fiduciary has a right of contribution or indemnity under ERISA. See *Schloegel* v. *Boswell*, 766 F. Supp. 563, 568 (S.D. Miss. 1991) (declining to follow the dicta in *Lindemann*).

[20] The court in *Call* acknowledged that ERISA authorizes the development of a federal common law of trusts, 881 F.2d at 631-632,

has accordingly never issued a definitive ruling on the merits of the argument adopted by the Second Circuit.[21] None of the other nine circuits has squarely addressed the issue.

Further, the question whether Section 502 of ERISA authorizes courts to fashion a federal common law right of contribution is a complex one, and this history reflects the fact that there has not yet been a thorough examination of the issue in the lower federal courts. The decision of the Second Circuit here in fact represents the first time a court of appeals has explicitly addressed whether a federal common law right of contribution is consistent with this Court's decision in *Russell* (which was decided after *Free*). The court of appeals' careful analysis of the federal common law issue may well bring the question into sharper focus in the lower courts and provide the basis for a consensus to develop.

b. The contribution issue is important to the implementation of ERISA, but the interests of ERISA litigants do not require immediate resolution of the issue by this Court. The interests of ERISA beneficiaries and participants are protected because plaintiffs may continue to recover a plan's losses "from any or all breaching fiduciaries, each of whom would be jointly and severally liable," Pet. App. A36, and any increased complexity of litigation may be mitigated by various procedures allowed under the Federal Rules of Civil Procedure. See note 11, *supra*.

The practical impact of the present decision upon fiduciaries also does not warrant immediate review. The court merely recognized a right of contribution; it neither

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but because the court believed itself bound by *Kim*, it never directly addressed the argument in favor of recognizing a federal common law right of contribution under ERISA.

[21] Given *Call*'s apparent approval of the Secretary's arguments and the fact that there is now a conflict between *Call* and the decision in this case, the Ninth Circuit may find it appropriate to consider this issue en banc if it arises again in that circuit. See 9th Cir. R. 35-1 (citing inter-circuit conflict as a basis for en banc review).

defined the scope of that right, nor held petitioners liable for contribution. Because the court of appeals has remanded the case for trial, it is unclear whether petitioners will ever have to satisfy a contribution or indemnity judgment. If they do not prevail on remand, a trial and any subsequent appeal in this case will presumably shed light on the practical concerns that inform the question whether to recognize a federal common law right of contribution under ERISA. See pp. 10-12, *supra*. Accordingly, the interlocutory posture of this case also counsels against further review at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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